STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 141752

DONALD RICHARDSON,
Defendant-Appellant.

Third Circuit Court No. 08-13456
Court of Appeals No. 291617

141752
PLAE'S suppl

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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Table of Contents

Table of Authorities

CASES

STATUTES AND RULES

OTHER AUTHORITIES

Counterstatement of Jurisdiction

The People accept and adopt defendant's statement of jurisdiction.

Counterstatement of Issues Presented

I.

In order to claim self-defense, the action taken by defendant must have appeared at the time to be immediately necessary to defend himself or another. Here, defendant responded to a woman hitting his house with a bat by firing six shots into her and another victim as they were walking away from the scene. Was defendant's use of deadly force necessary to defend himself or another?

The trial court answered, "No."
The Court of Appeals answered, "No."
The People answer: "No."
Defendant answers: "Yes."

II.

(The People have broken defendant's Issue II into two separate issues)

A trial court has wide discretion in matters of trial conduct and a defendant is not deprived of a fair trial because of judicial comments unless those comments are "so egregious and fundamentally unfair" that they result in actual prejudice. Here, the judge corrected defense counsel's impeachment methods and asked the attorney not to raise his voice when addressing the bench. The trial court dismissed the jury before further chiding defense counsel. Was defendant denied a fair trial?

The trial court answered, "No."
The Court f Appeals answered, "No."
The People answer: "No."
Defendant answers: "Yes."

III.

(The People have broken defendant's Issue II into two separate issues)

The trial court does not abuse its discretion in failing to repeat instructions addressing areas that were not included in a jury's specific request for instruction. Here, the trial court defined the terms "dwelling" and "curtilage" in response to the jury's specific question for the meaning of "home," but then did not repeat the definition of "curtilage" a second time when the jury indicated they could not make a decision. Was it error for the trial court not to redefine "curtilage" for the second time when not asked to do so by the jury?

The trial court answered, "No."
The Court of Appeals answered, "No."
The People answer: "No."
Defendant answers: "Yes."

IV.

A defendant has no duty to retreat if within his home or the curtilage of his home. Here, the jury was correctly instructed – pursuant to standard jury instruction CJI2d 7.16 – that a defendant has no duty to retreat if within his home or the curtilage of that home. Was it outcome-determinative error to give the standard jury instruction telling jurors there was no duty to retreat?

The trial court did not answer this question.
The Court of Appeals did not answer this question.
The People answer: "No."
Defendant answers: "Yes."

Counterstatement of Facts

In late afternoon on September 25, 2008, defendant's wife, Mrs. Richardson, was involved in fight between herself and the neighborhood children.[1] When Teresa Moore – who lived in a two-flat house directly next-door to the Richardsons' house on Forrer Street in Detroit – arrived home that afternoon around 4:30pm with her two daughters, she noticed eggshells on her porch and saw Mrs. Richardson standing on the Richardsons' porch calling them "bitches" and "hoes," and saying she was tired of them.[2] Ms. Moore testified that Mrs. Richardson proceeded to throw more eggs and hot water at her while Mr. Richardson, the defendant, sat on the steps of his porch and watched what was going on.[3] Ms. Moore asked defendant to do something about his wife's behavior, but it was to no avail.[4] Ms. Moore told Mrs. Richardson it would be wrong of her to throw acid on Mrs. Richardson, but she also testified that she did not actually have any acid.[5] Ms. Moore then witnessed Mrs. Richardson push a twelve-year-old child named Brandon. In response, Ms. Moore called Brandon's mom, Brandy Abrams, and told her to come pick up her child.[6]

Ms. Abrams testified that, when she pulled up in front of Ms. Moore's home, she noticed eggshells on both Ms. Moore's porch and her son's shirt. She saw a number of children outside. She also observed that Mrs. Richardson, whom she barely knew, was standing on her porch "ranting

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[1]References to the trial record are cited by the date of the hearing followed by the page number; 01/26, 10

[2]Id. at 10-12.

[3]Id.

[4]Id. at 13-14.

[5]Id. at 23.

[6]Id. at 14-15.

and raving."[7] Ms. Abrams went over to the Richardsons' house to discuss what was going on. Mrs. Richardson, who was standing in her doorway, asked Ms. Abrams why "the fuck" she was at her house, called her a "bitch," and said that she was going to "whoop [her] ass too."[8] For the 5-6 minutes this was going on, Ms. Abrams testified that she was standing on the grass next to the Richardsons' porch, while Mrs. Richardson was in the doorway of her house and defendant was sitting on the stairs of the porch.[9]

Ms. Abrams testified that – after Mrs. Richardson spit at her and told her she was going to "whoop [her] ass" – she retrieved a bat from the yard and, while still standing on the grass next to the porch, hit the railing of the porch and the screen door.[10] Ms. Abrams testified that another woman, Ms. Moore's sister, then removed the bat from her.[11] While this was going on, defendant pushed his wife in the house at least once, but she kept trying to come out and swear at Ms. Abrams.[12] She then noticed Mr. Dinwiddie come over to calm the situation down and talk to Mr. Richardson for a moment.[13] She then heard defendant say he was "tired of this shit" and heard the first shot. From where she was standing, she could not see the gun.[14] Ms. Abrams, after hearing the

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[7]01/12, 77-78.

[8]Id. at 79.

[9]Id. at 80-81.

[10]Id. at 81.

[11]Id. at 124.

[12]Id. at 83.

[13]Id. at 83-84.

[14]Id. at 84-85.

gunshots, started running over to Ms. Moore's grass to pick up her godson.[15] She noticed she was shot in the arm, but was attempting to get the kids out of the way of defendant's shooting when she heard 4-5 more shots.[16] She went to the side door of Ms. Moore's home and was eventually let in. Once she was in the house, she noticed that she had been shot in her right arm, her stomach area, her right side, and her left leg.

Mr. Dennis Dinwiddie testified that he lived in the neighborhood and went over to Ms. Moore's home that day to play cards.[17] When he arrived that evening, he noticed Mrs. Richardson throwing eggs and rocks at the neighborhood children and vice versa. He was sitting on Ms. Moore's porch watching the scene when he saw Ms. Abrams pull up in her car. When Ms. Abrams went over to the house with a bat, he stated that Mrs. Richardson was inside the house and Mr. Richardson was standing in the yard with his hands in his pockets.[18] He then went over to the Richardsons' to bring Ms. Abrams back so that nobody would get hurt.[19]

He testified that he walked Ms. Abrams down the stairs and was walking her back towards Ms. Moore's house when he heard defendant say he was "tired of this shit." Mr. Dinwiddie then heard a shot and felt something like "a dagger in [his] back."[20] Mr. Dinwiddie testified that he was

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[15]01/12, 85.

[16]Id. at 86.

[17]Mr. Dinwiddie admitted that he was drinking that day and his medical records – which the jury saw – indicated that he was intoxicated. Id. at 150.

[18]Id. at 136.

[19]Id. at 137.

[20]Id. at 85, 137-138.

on his way back to Ms. Moore's house with Ms. Abrams when he heard the first shot and realized he'd been shot in the back.[21] He testified that defendant was behind him when he was shot.[22]

Likewise, Ms. Moore testified that Mr. Dinwiddie grabbed Ms. Abrams by the arm, and that the two were proceeding to turn back toward her house when defendant stood up, pulled out a black handgun, said he "was tired of his shit," and stared firing at Mr. Dinwiddie and Ms. Abrams.[23] While all three of the witnesses – Ms. Abrams, Mr. Dinwiddie, and Ms. Moore – gave slightly different versions of what occurred, they all confirmed that Ms. Abrams never hit defendant with the bat or even threatened to hit defendant with the bat.[24] As a result of the shooting, both Ms. Abrams and Mr. Dinwiddie were taken to the hospital, where both underwent surgeries to remove the bullets. On the day they testified, Ms. Abrams still could not raise her right arm and Mr. Dinwiddie testified that he had been walking with a cane ever since that day.[25]

Following the court's denial of defendant's motion for a directed verdict, defendant had two individuals testify that he had a reputation for being a law-abiding person, but neither of the two witnessed the shooting at issue.[26] Defendant then presented the testimony of Annie Norman, a

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[21]01/12, 137-138, 155; While appellant's original appellate counsel acknowledged in his Statement of Facts that Mr. Dinwiddie was shot in the back, defendant himself has since written several "letters" of sorts claiming that Mr. Dinwiddie was actually shot in the chest. The testimony and medical records do not support defendant's assertion. Mr. Dinwiddie testified in detail that he was shot in the back, and the medical records make clear that the gunshot wound was to the "posterior flank," i.e. the back side.

[22]Id. at 138.

[23]01/26, 20-24.

[24]01/12, 92, 142; 01/26, 26.

[25]01/12, 90-91, 129, 141.

[26]01/26, 88-92.

woman who saw the shooting from across the street and four houses down. She testified that she never saw "the female with the bat" on defendant's porch, nor did she see anybody strike either of the Richardsons.[27] Defendant then took the stand on his own behalf and gave a much different version of events. He stated that he'd been having problems with the neighbors ever since Ms. Moore moved in and that he had called the police several times in the past without getting a response.[28] In response to the issues with his neighbors, defendant decided that afternoon to strap three guns to his person. He was going in and out of his house while his wife fought with the neighborhood children.[29]

He claimed he was sitting on his porch when Mr. Dinwiddie, who was on Ms. Moore's porch, yelled that he "didn't have a problem busting a woman upside the head." According to defendant, Ms. Abrams then ran up with a bat, hit and shattered the screen door with a bat, and then hit him in the chest with the bat.[30] Mr. Dinwiddie, according to defendant, was coming up behind her and he could not see if he had anything in his hands. After Ms. Abrams hit him, he "just opened fire" and fired two shots, "one for each of them."[31] When he fired the first shot, he said the scene was "a mess" and that "everyone was scrambling."[32] He continued firing. When he stopped firing,

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[27]01/26, 94, 100-102.

[28]Id. at 110.

[29]Id. at 116, 122; Defendant had a valid CCW permit. Id. at 44.

[30]Id. at 111-113.

[31]Id. at 113, 125

[32]Id. at 123.

he noticed Ms. Abrams was trying to get back into Ms. Moore's house.[33] He then reloaded his gun with six more bullets and again waited on his porch.[34]

During closing arguments, the People argued that defendant did not have an honest and reasonable belief that he or his wife were in danger when he fired six shots into two people who were walking away.[35] The prosecutor never stated that defendant had a duty to retreat, nor did she ever mention that defendant should have gone back into his house and called the police rather than standing his ground on his porch. Likewise, in defense counsel's closing, he specifically told the jury that defendant had no duty to retreat.[36] Defense counsel argued primarily that defendant acted in self-defense, that he was subject to a violent attack, and that he honestly believed he had to use deadly force to protect himself and his wife.[37] He further told the jury that defendant was on his own property and had no duty to retreat.[38]

Consistent with defendant's self-defense theory, the trial court went on to instruct the jury on self-defense. In addition to the standard self-defense instruction, the Court also read "CJI2nd 7.16: Duty to Retreat to Avoid Using Deadly Force" almost verbatim. Specifically, the Court instructed the jurors:

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[33]01/26, 124.

[34]Id. at 125.

[35]Id. at 136-137, 149.

[36]Id. at 145.

[37]Id. at 141-146

[38]Id. at 145.

> A person who can – a person can use deadly force and self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed he needed to use deadly force and self-defense.
>
> However, a person is not required to retreat in his or her own home, nor if the person reasonably relieved that the attacker is about to use a deadly weapon, nor if the person is subject to a sudden and violent attack.
>
> Further, a person is not required to retreat if the person is not engaged in the commission of a crime at the time deadly force is used, and has a legal right to be where the person is at that time, and has a honest and reasonable belief that the use of deadly force is necessary to prevent imminent death, great bodily harm of person or another, himself or another.[39]

The trial court also instructed that it was the prosecutor's burden of proving beyond a reasonable doubt that defendant did not act in defense of himself or another.[40] Defense counsel had no objections to any of instructions.[41]

The following day, the jury sent out a note asking for the definition of "home."[42] On defense counsel's suggestion and with his express approval, Judge Jackson instructed the jurors as follows:

> There is a definition, and we can just sort of put at rest just the home word right now. There is – the statute says that in cases of self-defense the common law of this state applied except that the duty to retreat before using deadly force is not required if an individual is in her own home or dwelling or within the curtilage of that dwelling. And curtilage, as a general definition, meaning land or yard adjoining a house usually within an enclosure. And also, as used in this section,

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[39]01/26, 168.

[40]Id. at 167-168.

[41]Id. at 174.

[42]01/27, 3.

> dwelling means a structure or shelter that is used permanently or temporarily as a place of abode and including an appurtenant structure attached to that structure, meaning something that is attached to that structure or shelter also. Sometimes people may have sheds or something like that, enclosed porches, something along that line.[43]

The Court again instructed the jury on self-defense by reading CJI2d 7.15. When he finished and the jury was excused, defense counsel stated that he was "pleased with the instructions."[44]

Two days later, the jury sent out a note that they could not make an unanimous decision.[45] The Court re-instructed the jury with the same instructions he had given the first day, including the duty-to-retreat instructions and all of the exceptions. After the jury was excused, defense counsel asked the court to re-instruct the jury on the definition of "dwelling" and "curtilage." Judge Jackson declined, stating that he had already instructed the jury on those definitions and did not need to do so again.[46] The jury later asked for the testimony of Annie Norman and the cross-examination of defendant. The trial court obliged, and the court reporter read back the requested testimony.[47]

Shortly thereafter, the jury returned a verdict of guilty on two counts of assault with intent to commit great bodily harm – one count for each victim – and felony firearm. The jury found him not guilty of two counts of assault with intent to commit murder.[48] He was sentenced on February 26, 2009, to 36-120 months for both counts of assault with intent to commit great bodily harm, and

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[43]01/27, 16-17.

[44]Id. at 20.

[45]01/29, 3.

[46]Id. at 14-15.

[47]Id. at 17, 19.

[48]Id. at 22-23.

a consecutive two years for felony firearm.[49] Defendant appealed to the Court of Appeals, raising the following two issues: (1) whether the evidence established that defendant acted in self-defense, and (2) whether the trial court denied defendant a fair trial by "displaying prejudice against the defendant and giving confusing and contradictory jury instructions." On July 27, 2010, the Court of Appeals affirmed the convictions.

This case is now before this Court on defendant's application for leave to appeal. In this Court's order requesting oral argument on whether to grant the application, the parties were asked to address ". . . whether, under the circumstances of this case, it was proper to instruct the jury in accordance with CJI2d 7.16, which permits consideration of whether defendant had a duty to retreat . . . ." The People now file this supplemental brief addressing both that issue and the original issues presented in defendant's application.

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[49] 02/26, 26-27.

Argument

I.

In order to claim self-defense, the action taken by defendant must have appeared at the time to be immediately necessary to defend himself or another. Here, defendant responded to a woman hitting his house with a bat by firing six shots into her and another victim as they were turning away from defendant's house. Defendant's use of deadly force was not necessary to defend himself or another.

Standard of Review

While defendant frames it somewhat differently, the question here is really whether sufficient evidence existed to convict defendant of assault with intent to do great bodily harm (ABGH) despite his claim of self-defense. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence presented in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[50] "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[51] This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses.[52]

Discussion

After being properly instructed regarding defendant's claim of self-defense, the jury rejected that claim and correctly found defendant guilty of two counts of AGBH for firing six shots into two fleeing victims, at least one of whom was completely unarmed. The elements of AGBH are (1) an

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[50] *People v Wolfe,* 440 Mich 508, 515 (1992).

[51] *People v Allen,* 201 Mich App 98, 100 (1993).

[52] *People v Wolfe*, *supra*, 440 Mich at 514.

attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.[53] Here, there is little dispute that defendant armed himself with three loaded guns, sat on his porch while his wife antagonized the neighbors they did not like, said he was "sick of this shit," and fired four shots into Ms. Abrams and two shots into Mr. Dinwiddie.[54] The question, therefore, is not whether there was sufficient evidence to convict defendant of two counts of AGBH, but whether defendant properly acted in self-defense. The jury – along with the Michigan Court of Appeals – correctly determined that he did not.

To establish lawful self-defense or defense of another, the evidence must show that: (1) the defendant honestly and reasonably believed that he or another was in imminent danger; (2) the danger feared was death or serious bodily harm; and (3) the action taken appeared at the time to be immediately necessary to defend himself or another.[55] Defendant is only entitled to use the amount of force necessary to defend himself.[56] While there is no affirmative duty to retreat when one is within his own dwelling or the curtilage of that dwelling, the defendant still must honestly and reasonably believe that it is necessary for him to exercise deadly force.[57] As this Court noted in *People v Lennon*:

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[53]MCL 750.84; *People v Parcha*, 227 Mich App 236, 239 (1997).

[54]1/12, 83-88, 139-142; 01/26, 21-24, 114-116.

[55]*People v Riddle*, 467 Mich 116, 119 (2002), citing *People v Heflin*, 434 Mich 482, 502-503 (1990); MCL 780.972.

[56]*People v Kemp*, 202 Mich App 318, 322 (1993).

[57]MCL 768.21c(1)(extending the no-duty-to-retreat rule to when one is within the curtilage of his dwelling); *People v Riddle*, *supra*, 467 Mich at 121 n. 11 (". . . we hold only that a person is not obligated to retreat in his dwelling or its attached appurtenances before exercising deadly force in self-defense if he honestly and reasonably believed that he is in imminent danger of death or serious bodily harm.").

> [t]he question to be determined is, did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of [losing] his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger?[58]

Indeed, "the touchstone of *any* claim of self-defense . . . is *necessity*."[59]

In this case, the People presented sufficient evidence that defendant did not act in self-defense when he declared that he was "sick of this shit" and fired six shots at two people who were turning away from him. The first victim, Brandy Abrams, testified that she went over the grass next to Mrs. Richardson's porch to ask her about why she'd hit Ms. Abrams's son.[60] Mrs. Richardson was on her front porch "ranting and raving" and telling Abrams that she was going to "whoop her ass."[61] After Mrs. Richardson spit on her, Ms. Abrams picked up a bat and hit the screen door of the Richardson's house while Mrs. Richardson was in the house and defendant was sitting on the porch.[62] At that point, the second victim, Dennis Dinwiddie, went over to the Richardsons' yard and – in an effort to help mediate the situation – took Ms. Abrams by the arm to bring her back to Ms. Moore's home.[63] Defendant, who had previously been uninvolved in the argument, then stood up and pushed his wife into the house.[64] As Ms. Abrams and Mr. Dinwiddie were turning away from

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[58]*People v Riddle*, *supra*, 467 Mich at 127, quoting *People v Lennon*, 71 Mich 298, 300-301 (1888).

[59]*People v Riddle*, *supra*, 467 Mich at 127(emphasis in original).

[60]01/12, 76.

[61]Id. at 77-79.

[62]Id. at 81.

[63]Id. at 137.

[64]Id. at 83.

the Richardsons, they heard defendant say that he was "sick of this shit" and then heard gunfire.[65] Mr. Dinwiddie testified that first shot out of defendant's gun felt like "a dagger in [his] back."[66] Ms. Abrams was shot four times in various places as she was running to escape defendant's gunfire.[67]

A neighbor who witnessed the event, Teresa Moore, largely corroborated the victims' testimony of what happened. She testified that she was the one who had called Ms. Abrams to tell her that Mrs. Richardson had hit her son.[68] She further testified that Mrs. Richardson had been on her porch screaming and throwing hot water, eggs, and rocks at Ms. Moore and the neighborhood children for some time before Ms. Abrams even appeared on the scene.[69] When Ms. Abrams arrived, she tried unsuccessfully to talk to Mrs. Richardson and then, while still standing on the grass next to the porch, swung a bat and hit the screen-door.[70] Defendant was merely sitting on the porch, uninvolved in the fight, until he stood up, said he was tired of what was going on, fired six shots directly at the victims, and then reloaded the gun.[71] Ms. Moore testified that the two victims were turning in the direction of her house when Mr. Richardson started firing.[72]

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[65]01/12, 84-85, 139-141.

[66]Id. at 140.

[67]Id at 88, 155.

[68]01/26, 12-14.

[69]Id. at 11-14.

[70]Id. at 18-20.

[71]Id. at 20-24.

[72]Id. at 20-21.

Viewed in the light most favorable to the prosecution, the facts belie defendant's self-defense claim. Besides the defendant himself, none of the other witnesses claimed that Ms. Abrams ever hit or threatened either Mrs. Richardson or the defendant with the bat. Indeed, Mrs. Richardson was either on her porch or actually in her home for the majority of the altercation and defendant was not even involved in the fight until he pushed his agitated wife in the house and pulled out his gun. Even Annie Norman – a defense witness who lived across the street and four houses down – testified that Ms. Abrams was never on the porch and never struck anyone with a bat. She testified, consistent with the other witnesses, that Mrs. Richardson was within her home, defendant was on the porch, and Ms. Abrams never hit or attempted to hit either of them with the bat.[73] Further, the People admitted the medical records of the two victims, proving that Ms. Abrams was shot in four separate places and Dinwiddie was shot in the "posterior flank," i.e. the back side.[74]

So, through both witness testimony and physical evidence, sufficient evidence existed to prove that the two victims were walking away from defendant when he decided he was "sick of this shit" and started shooting at them. Because of this, and because Ms. Abrams only hit the door with the bat while Mrs. Richardson was in the house and defendant was not even involved in the fight, it was not immediately necessary for defendant to start firing six shots at two fleeing victims in the middle of a neighborhood crowded with children. Viewing the evidence in a light most favorable to the prosecution, a jury could conclude beyond a reasonable doubt that defendant was not justified in using deadly force against his fleeing victims. Thus, defendant's first claim must fail, and defendant's application for leave to appeal should be denied.

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[73] 01/26, 100-102.

[74] Id. at 113, 125

II.

A trial court has wide discretion in matters of trial conduct and a defendant is not deprived of a fair trial because of judicial comments unless those comments are "so egregious and fundamentally unfair" that they result in actual prejudice. Here, the judge corrected defense counsel's impeachment methods and asked the attorney not to raise his voice when arguing with the bench. The trial court dismissed the jury before further chiding defense counsel. Defendant was not denied a fair trial.

Standard of Review

Because trial counsel did not object to the trial court's comments or conduct, review is for plain error. "Reversal is warranted only when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence."[75] It is defendant's burden to establish plain error and prejudice.[76]

Discussion

Defendant was not denied a fair trial merely because Judge Jackson corrected the defense attorney for improper impeachment and asked the attorney not to raise his voice. The party claiming bias "must overcome a heavy presumption of judicial impartiality."[77] The test to determine judicial partiality is whether the conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial."[78] Judicial comments

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[75] *People v Ackerman*, 257 Mich App 434, 448-449 (2003).

[76] *People v Carines*, 460 Mich 750, 763, 771 (1999).

[77] *People v Wells*, 238 Mich App 383, 391 (1999).

[78] *People v Collier*, 168 Mich App 687, 698 (1988); *People v Paquette*, 214 Mich App 336, 340 (1995).

occurring during a trial that are critical, disapproving, or hostile to an attorney generally cannot be relied upon to demonstrate partiality.[79] Likewise, displays of annoyance, anger, frustration, impatience, or dissatisfaction, if deemed within the bounds of what individuals may on occasion display, cannot establish partiality.[80] Indeed, the trial court has wide discretion and power in matters of trial conduct[81] and defendant is only entitled to a new trial if he can demonstrate that the allegedly improper comments were "so egregious and fundamentally unfair" that they resulted in actual prejudice.[82]

Here, viewing the record as a whole, the trial court's comments did not deprive defendant of a fair and impartial trial. The record is replete with instances of the trial court sustaining defense counsel's objections, allowing defense counsel to question witnesses without interruption or comment, and giving weight to defense counsel's arguments. Likewise, while Judge Jackson did express frustration with defense counsel's line of questioning in attempting to impeach the victim and defense counsel's tone of voice in speaking to the bench, he promptly dismissed the jury before chiding defense counsel's methods and attitude.[83] The trial court did not comment on the evidence or question the credibility of any of the witnesses. To the contrary, the comments made by Judge Jackson were

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[79] *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30 (1996).

[80] *Id.*

[81] MRE 611 (a); *People v Paquette*, *supra* 214 Mich App at 340 (1995); see *People v Collier*, *supra*, 168 Mich App at 698.

[82] *People v Johnson*, 245 Mich App 243, 268 (2001).

[83] 1/26, 77.

the direct result of defense counsel's refusal to follow instructions regarding the impeachment of the witnesses.[84]

Further, even if there were some degree of prejudice as a result of Judge Jackson's comments, any such prejudice was mitigated by the trial court's instruction to the jury that his comments and questions were not evidence. Judge Jackson specifically instructed the jurors that it was his duty to make sure the trial was conducted according to the law and that they should pay no attention if they believe he had a personal opinion about the case.[85] Jurors, of course, are presumed to follow their instructions.[86] Thus, the curative instruction sufficiently negated any such perceived prejudice.

Ultimately, Judge Jackson's comments to the defense attorney about whether the impeachment methods were proper hardly rose to the level of fundamental unfairness. To the contrary, such comments are within the trial court's power to control the proceedings and any further comments made merely showed a frustration with defense counsel's refusal to follow instructions. The judge properly dismissed the jury before making any further comments about defense counsel's conduct or attitude. Thus, defendant is unable to establish actual prejudice, there is no indication that the trial court's comments in any way deprived defendant of a fair trial, and defendant's application for leave to appeal should be denied.

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[84]As the Court of Appeals correctly noted, Judge Jackson was accurate in his statements to counsel that he could not impeach a witness regarding two allegedly conflicting statements when the statements were about two different times during the incident.

[85]1/26, 153.

[86]*People v Unger*, 278 Mich App 210, 235 (2008).

III.

The trial court does not abuse its discretion in failing to repeat instructions addressing areas that were not included in a jury's specific request for instruction. Here, the trial court defined the terms "dwelling" and "curtilage" in response to the jury's specific question for the meaning of "home," but then did not repeat the definition of "curtilage" a second time when the jury indicated they could not make a decision. It was not error for the trial court not to re-define "curtilage" for the second time when not asked to do so by the jury.

Standard of Review

Preserved claims of instructional error are reviewed de novo.[87] This Court reviews jury instructions in their entirety to determine if there is an error requiring reversal.[88] Even imperfect instructions, however, do not constitute error if they fairly present the issues to be tried and sufficiently protect the defendant's rights.[89] A preserved, nonconstitutional error is not a ground for reversal unless it is more probable than not that the error was outcome determinative.[90]

Discussion

Defendant was not prejudiced by the trial court's refusal to re-instruct the jury on the definition of "curtilage" because the jury had already heard the definition, did not specifically ask to be re-instructed on the definition, and was otherwise properly instructed. A trial court is not obligated to repeat previously given instructions so long as the "court's supplemental instruction was responsive

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[87] *People v Hubbard (After Remand)*, 217 Mich App 459, 487 (1996).

[88] *People v McGhee*, 268 Mich App 600, 696 (2005).

[89] *People v Waclawski*, 286 Mich App 634, 678 (2009); *People v Dumas*, 454 Mich 390, 396 (1997).

[90] *People v Cornell*, 466 Mich 335, 362-364 (2002).

to the jury's request and did not serve to mislead the jury in any manner."[91] When the jury asks a specific question, the trial court is not required to give *all* of the instructions previously given, merely those specifically asked for by the jury.[92] In *People v Parker*, for example, the trial court initially instructed the jury on the elements of first- and second-degree murder and the elements of self-defense. When the jury subsequently asked to be re-instructed as to the elements of murder, the trial court again gave the elements of the crime, but did not also re-instruct on self-defense. The Court of Appeals held that the trial court did not err in failing to re-instruct on self-defense, as the jury did not ask for that instruction to be re-read.[93]

Here, after being read the jury instructions for self-defense – including the instruction that there is no duty to retreat when one is within his home – the jurors deliberated for a day and then asked for clarification regarding what is considered to be the "home." At defense counsel's urging, the trial court then informed the jury that there was no duty to retreat before using deadly force if defendant was in his dwelling or the attached appurtenances or curtilage of that dwelling.[94] Specifically, the court instructed:

> There is a definition, and we can just sort of put at rest just the home word right now. There is – the statute says that in cases of self-defense the common law of this state applied except that the duty to retreat before using deadly force is not required if an individual is in her own home or dwelling or within the curtilage of that dwelling. And curtilage, as a general definition, meaning land or yard adjoining a house usually within an enclosure. And also, as used in this section,

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[91] *People v Katt*, 248 Mich App 282, 311 (2001).

[92] *People v Parker*, 230 Mich App 677, 681 (1998); *People v Darwell*, 82 Mich App 652, 663 (1978).

[93] *People v Parker*, *supra*, 230 Mich App at 681.

[94] 1/27, 16-19.

> dwelling means a structure or shelter that is used permanently or temporarily as a place of abode and including an appurtenant structure attached to that structure, meaning something that is attached to that structure or shelter also. Sometimes people may have sheds or something like that, enclosed porches, something along that line.[95]

The Court again instructed the jury on self-defense by reading CJI2d 7.15. When he finished and the jury was excused, defense counsel stated that he was "pleased with the instructions."[96]

When the jury came back two days later and informed the trial court that it was unable to make a decision, Judge Jackson again instructed the jurors on self-defense and informed them yet again that there was no duty to retreat when one is within his dwelling or the curtilage of that dwelling.[97] After the jury was dismissed, defense counsel asked the trial court to re-instruct on the definition of "curtilage" and Judge Jackson declined, stating that he had already given the jurors that definition. Unlike the first time, the jury did not ask to be re-instructed when it came back the final time. Instead, they simply informed the trial court that they could not make a decision. The judge, in turn, re-instructed them on self-defense and, once again, said that there was no duty to retreat when one is within the curtilage of his dwelling. Because the jurors did not ask the judge to redefine curtilage, the trial court did not abuse its discretion in not repeating the entire definition. The jury was instructed on all of the charges and defenses several times and there is no evidence that the jury was in any way confused by the instructions. Thus, the fact that the court did not repeat a definition which it had already given did not prejudice defendant or deprive him of a fair trial. Defendant's third argument, therefore, also fails, and defendant's application for leave to appeal should be denied.

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[95]01/27, 16-17.

[96]Id. at 20.

[97]1/29, 4-12.

IV.

A defendant has no duty to retreat if within his home or the curtilage of his home. Here, the jury was correctly instructed – pursuant to standard jury instruction CJI2d 7.16 – that a defendant has no duty to retreat if within his home or the curtilage of that home. It was not outcome-determinative error to give the standard jury instruction telling jurors there was no duty to retreat.

Standard of Review

After the trial court initially instructed the jury on self-defense – including the standard jury instruction which indicated a defendant has no duty to retreat if within his home – defense counsel stated that he had no objection. When the jury asked the court to define "home," the court gave the definitions of "dwelling" and "curtilage" requested by defense counsel, reminded the jury that there is no duty to retreat if within those areas, and again read the jury the standard self-defense instructions. Defense counsel stated that he was "pleased with the instructions."[98] Where defense counsel has affirmatively approved of the instructions as given, any issues arising therefrom are waived on appeal.[99] Here, because counsel said he was satisfied with the self-defense instruction – including the court's instruction that there is no duty to retreat if within the home or curtilage – the issue has been waived.

Even if this Court finds that defense counsel did not affirmatively approve of the specific duty-to-retreat instruction at issue, defense counsel certainly did not object to any of the initial

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[98]01/27, 20.

[99]*People v Herron*, 464 Mich 593, 607 n. 8 (2001); *People v Carter*, 462 Mich 206, 214 (2000).

instructions and the issue is, therefore, unpreserved for appellate review.[100] Unpreserved claims are reviewed for plain error.[101] To avoid forfeiture under plain the plain-error rule, defendant must establish: (1) that error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights. Generally, the third requirement is only met when defendant can show that the error affected the outcome of the proceedings.[102] Even if defendant is able to establish the first three prongs, "reversal is only warranted when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence."[103]

In this Court's Order granting oral argument on the application, it specifically asked the parties to address whether "it was proper to instruct the jury in accordance with CJI2d 7.16, which permits consideration of whether the defendant had a duty to retreat."[104] Here, where defendant was on his porch and therefore had no duty to retreat, the question is whether it was plain error for the court to read the no-duty-to-retreat instruction.

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[100]01/26, 174.

[101]*People v Carines*, *supra*, 460 Mich at 772.

[102]*Id.* at 763.

[103]*Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737 (1993).

[104]This issue was not raised to the Court of Appeals and was not, therefore, briefed to this Court in the People's answer to defendant's pro per application for leave to appeal.

Discussion

Standard jury instruction CJI2nd 7.16 was properly given because defendant had no duty to retreat from the porch of his home and the instructions in this case – taken as whole – correctly informed the jury that a person is never required to retreat from his home, its attached appurtenances, or its curtilage. Further, even if it was improper to instruct the jury that a person generally has a duty to retreat, defendant cannot show outcome-determinative prejudice because that statement was immediately followed by four exceptions to the rule, including the exception that a defendant is never required to retreat from his home.

The trial court's instructions regarding the duty to retreat were an accurate statement of the law and successfully communicated to the jury the duty-to-retreat exceptions.

As an initial matter, the no-duty-to-retreat instruction given in this case was not erroneous and accurately stated the law regarding self-defense. The jury was properly instructed on the issue of self-defense and told – in accordance with the caselaw of this state and the recently enacted Self Defense Act[105] – that a defendant has no duty to retreat if within his dwelling or within the attached appurtenances or curtilage of his dwelling. In addition to reading the other applicable standard jury instructions regarding self-defense, the court read CJI2d 7.16, Duty to Retreat to Avoid Using Deadly Force, almost verbatim. Specifically, the court instructed:

> A person who can – a person can use deadly force and self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed he needed to use deadly force and self-defense.

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[105]MCL 768.21c.

> However, a person is not required to retreat in his or her own home,[106] nor if the person reasonably believed that the attacker is about to use a deadly weapon, nor if the person is subject to a sudden and violent attack.
>
> Further, a person is not required to retreat if the person is not engaged in the commission of a crime at the time deadly force is used, and has a legal right to be where the person is at that time, and has a honest and reasonable belief that the use of deadly force is necessary to prevent imminent death, great bodily harm of person or another, himself or another.[107]

Indeed, the court laid out the general proposition that there is a duty to retreat followed by four exceptions. The instruction represented a fair and accurate statement of the law that there is no duty to retreat if a person: (1) is within his home;[108] (2) is under the reasonable belief that the attacker is about to use a deadly weapon;[109] (3) is subject to a sudden and violent attack;[110] or (4) is not engaged in the commission of a crime, is where he has a legal right to be, and honestly and reasonably believed that the use of deadly force is necessary to prevent imminent death or great bodily harm.[111] Thus, because there was no legal error in the *substance* of the instructions given and

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[106]The Self Defense Act – passed following this Court's decision in *Riddle* – extended that rule to include not only one's dwelling and its attached appurtenances, but also to include the curtilage of the dwelling. In this case, however, any error resulting from not initially including the curtilage was cured when the jury asked for clarification of the term "home." The Court instructed the jury that "home" included its attached appurtenances and curtilage, and defined those terms to the satisfaction of defense counsel.

[107]01/26, 168.

[108]*People v Riddle*, *supra*, 467 Mich at 34-135.

[109]*Id.* at 119.

[110]*Id.* at 128-131, citing *People v Macard*, 73 Mich 15 (1888).

[111]MCL 780.972.

the jury was accurately told the status of the law, the next question becomes whether it was plain error to read the no-duty-to-retreat instruction when defendant had no duty to retreat.

The trial court did not err in giving the legally accurate no-duty-to-retreat instruction because it supported defendant's theory of the case and was applicable to defendant's argument.

In general, the instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence.[112] Here, defense counsel's theory was permeated by the notion that defendant had no duty to retreat. Indeed, counsel argued that defendant was in fear for his life and that he acted reasonably in standing his ground on his porch and protecting himself and his wife from harm. Counsel explicitly told the jury in his closing statement that defendant had no duty to retreat.[113]

The court confirmed defense counsel's assertion, instructing the jury accurately and completely that a person is never required to retreat when within his home, its attached appurtenances, or its curtilage. If anything, the reading of CJI2d 7.16 *benefitted* defendant, as the trial court essentially affirmed defense counsel's argument that defendant could stand his ground by repeatedly instructing the jury that there was no duty to retreat in four broad circumstances. Had the instruction not been read at all, the jurors may have assumed defendant should have just gone in his house instead of standing his ground. But defendant had no duty to retreat, and the jury instructions correctly and adequately informed the jury of that fact. Thus, the court did nor err in instructing the jury – consistent with defendant's closing argument – on the four broad exceptions to the general duty to retreat.

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[112] *People v Wess*, 235 Mich App 241, 243 (1999).

[113] 01/26, 145.

Even if it was improper to instruct regarding the general duty to retreat, defendant is unable to establish that the isolated sentence affected the outcome of the trial or the fairness of the proceedings.

While it may have been inapplicable for the court to read the first sentence of the standard instruction allowing the jury to "consider" whether defendant could have safely retreated but did not, that general rule was immediately followed by the four exceptions and did not affect the outcome of the trial or the fairness of the proceedings. CJI2nd 7.16, when read as a whole, represents one cohesive instruction stating a general rule – a defendant should retreat if he can safely do so – followed by the many exceptions to that rule, including the exception that one is never required to retreat from one's home.

In Footnote 30 of *People v Riddle*, this Court noted, in relevant part, that "if the defendant was inside his dwelling when he was attacked . . . . there would be no basis for an instruction allowing the defendant's failure to retreat to be considered in determining whether he acted in lawful self-defense."[114] Accordingly, had the court simply read the general rule allowing the consideration of defendant's failure to retreat without more, the jury could have improperly weighed that fact in deciding whether defendant honestly and reasonably believed the use of deadly force was necessary.

But that was not what occurred here; the general rule was immediately followed by the four very broad exceptions which, in a case such as this, served to basically swallow the general rule. Jury instructions must be reviewed in their entirety rather than extracted piecemeal to determine whether an error occurred.[115] To that end, "[t]he reviewing court must balance the general tenor of

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[114]*People v Riddle*, *supra*, 467 Mich at 141 n 30.

[115]*People v Aldrich*, 246 Mich App 101, 124 (2001); *People v Dumas, supra*, 454 Mich at 396.

the instructions in their entirety against the potentially misleading effect of a single isolated sentence."[116] Looked at as a whole, the instructions accurately informed the jurors that they could not consider defendant's failure to retreat because one is never required to retreat if within his home, its attached appurtenances, or its curtilage. Because defendant was clearly within the curtilage of his home and jurors are presumed to follow their instructions, defendant's rights were sufficiently protected by the court's instruction that one is never required to retreat from his home.

Regardless of whether it was error to state the general rule regarding the duty to retreat to the jury, defendant is unable to establish the sort of outcome-determinative prejudice demanded by plain-error review. In *People v Carines*, for example, the trial court correctly instructed the jury on the elements of felony murder, but then – when giving the aiding and abetting instruction – erroneously instructed the jury that the prosecution did not have to prove that defendant participated in the killing.[117] This Court held that it was plain error for the trial court to incorrectly instruct the jury regarding the second element of aiding and abetting. But this Court went on to hold that defendant could not establish prejudice because the trial court's instructions, when viewed as a whole, adequately protected defendant's rights. While the instructions were imperfect, this Court reasoned, they adequately conveyed that defendant had to have participated in the underlying offense to be found guilty.[118] Further, even if defendant had met the third prong, this Court held that it would

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[116]*People v Waclawski*, *supra*, 286 Mich App at 675, citing *People v Freedland*, 178 Mich App 761, 766 (1989).

[117]*People v Carines*, *supra*, 460 Mich at 141-142.

[118]*Id.* at 142-143.

still have declined to reverse because "the alleged error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings."[119]

In this case, even if the instructions were imperfect for giving the general rule regarding the duty to retreat, reversal is not required because the instructions accurately conveyed the law and protected defendant's rights. While the first sentence of the instruction regarding the general duty to retreat may have been inapplicable, it was a correct statement of the law and – when read in conjunction with the instructions as a whole and the four exceptions *immediately* following it – did not affect the outcome of the case or the fairness of the proceedings. Indeed, this case underscores the well-settled principle that a reviewing court must review jury instructions in their entirety without extracting a single sentence from the context of otherwise accurate and fair instructions which sufficiently protected defendant's rights. Defendant's application for leave to appeal should be denied.

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[119] *People v Carines*, *supra*, 460 Mich at 143.

Relief

THEREFORE, the People request this Honorable Court to deny defendant's application for leave to appeal.

Respectfully submitted,

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